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Br. of Underwood for Resp't.
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Filed Dec. 21. 1901.

In the

Supreme Court of the United States

Ex-Parte Chattanooga-National Building & Loan Association, *Petitioner.*

Petition for Certiorari.

BRIEF OF

O. W. UNDERWOOD and
W. H. DENSON

ATTORNEYS FOR RESPONDENTS

In the Supreme Court of the United States.

Ex-Parte Chattanooga National Building and Loan Association, *Petitioner.*	October Term, 1901.

The prayer of the petition should not be granted, nor should the certiorari be awarded.

There is no merit whatever in the petition. The case was elaborately argued before the Court of Appeals, and exhaustive arguments were presented in briefs. After mature consideration, the Court of Appeals pronounced its judgment in favor of the Appellants. After such judgment, petitioners here, filed a motion for a rehearing, and the Court denied the same.

All the points presented in the petition and in the brief of counsel in support of the petition, together with authorities cited, were presented to the Court of Appeals. Reference is made to these acts, to show the opinion of the Court was not made hurriedly or unadvisedly, but after mature reflection and consideration, and in view of the law, as now presented to this court, by counsel for the petition on their brief.

See case reported Denson vs. Chattanooga Nat. Building and Loan Association 107 Federal Rep. 777.

Attention of the Supreme Court is called to the fact, that the petition for certiorari is not as full and complete of the facts in the case, as the record of the case before the Court of Appeals.

From the allegations in the third paragraph of the petition, it appears that the petitioner had no place of business or resident agent in the State of Alabama on the 25th of May, 1895, and prior thereto, but it would seem from the statements therein, that the petitioner had such place and agent just after the 25th of May, 1895.

The note and mortgage were executed in Gadsden, Alabama, and delivered in Gadsden, Alabama, on the 10th of June, 1895, this being the TIME and PLACE and MODE in which the transaction was consummated, and not on that day, AND NOT UNTIL SOME MONTHS AFTER THE LOAN WAS MADE TO DENSON, and not until the 7th of October, 1895, did the petitioners obey the laws of Alabama prescribing the conditions under which foreign corporations may do business in that State.

See the facts set out in the opinion of the court in this case.

Denson vs. Chattanooga Nat'l. Bld. and Loan Assn., 107 Fed. Rep. 777, 778, 779.

See Record (printed transcript filed herein) page 59.

Again the petition fails to show, (see 4th paragraph) that the application for the stock and loan was made on the suggestion and at the solicitation of Kennedy, the traveling and soliciting agent of the petitioner, and that all of said applications and papers were made and executed by Denson in Gadsden, Alabama, and delivered by him to the said agent of petitioner in Gadsden, Alabama, and that said agent forwarded the same to petitioner at its home office, see:—Record pages 34, 36.

Denson vs. Chatt. Nat. B. and L. Ass'n. 107 Fed. Rep. 778.

It appears from the allegations of said paragraph, that the presence of Kennedy, the traveling and soliciting agent of petitioner, in Gadsden was a mere fugitive visit, a mere accidental presence in Gadsden, and with no intention to solicit business there, but the same was done at the solicitation of Denson and for his accommodation merely.

The truth is, at the time the negotiations were commenced with Denson, the petitioner had been for some time prior thereto "soliciting subscriptions to stock and receiving applications for loans in the State of Alabama." See

Denson case, 107 Fed. Rep. 779.
Record pp. 24, 25.

The 5th paragraph of the petition, and all other parts thereof, fail to show that the application for the loan "was accompanied by the report of two persons, selected by the petitioner, fixing the value of the property to be mortgaged at $8,000.00 and the certificate of an attorney, also selected by the petitioner, with reference to the condition of the title." See

Denson case 107, Fed. Rep. 778.
Record pages 42, 57, 58.

There is a want of fullness in the sixth paragraph of the petition as to the execution of the note and mortgage and their delivery, and also the delivery of the check and the payment of the money thereon by the Gadsden bank.

The truth is, the note and mortgage were prepared at the home office of petitioner, and forwarded to Kennedy, the said agent by whom the application had been taken, and forwarded to the home office. At the same time the check of petitioner, for the loan, on the Chattanooga National Bank of Chattanooga, Tenn., drawn in favor of Denson, was sent to D. P. Goodhue of Gadsden, Alabama, with instructions to him to deliver said check to Denson, when he should have executed and delivered the note and mortgage. Denson executed the note and mortgage and delivered the same to the petitioner's agent, at Gadsden, Alabama, and the agent delivered the check to Denson, directing him to present the same to the First National Bank at Gadsden which would pay the same.

The check was presented to said bank and the same was paid to Denson, the cashier paying the same "under an understanding with the said building and loan association, that the

Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." See

Denson case, 107 Fed. Rep. 778, 779.
Record pages 44, 45, 51, 58, 59.

On an inspection of the evidence in the case it will be ascertained that the Court of Appeals was correct in saying that everything was done in Alabama by petitioner to consummate this loan to Denson with the single exception, that petitioner said "yes" in Tennessee.

To come within the condemnation of the law of Alabama, it is not necessary that the contract should have been concluded in Alabama. The laws of Alabama are prohibitory of foreign corporations DOING ANY BUSINESS IN THAT STATE.

If the said laws were prohibitory of MAKING ANY CONTRACT in Alabama by foreign corporation, then it would be necessary to show the contract was made in Alabama,—was an Alabama contract.

The Supreme Court of Alabama has defined what is meant by the constitution and statutes of that state in the use of the language "do any business in this State," the language of the constitution, and "engaging in or transacting any business in this State," language of the statute.

Such definition does not require a contract to be consummated in the State by a foreign corporation to bring into action the prohibition of the laws against foreign corporations doing, engaging in or transacting any business in the State.

The transaction of any business, or any part thereof, for the carrying on of which the corporation was created comes within the purview of the prohibitory laws. See.

Denson's case 107 Fed. Rep. 780 and authorities there cited.

It is held by the Supreme Court of Alabama, that the doing of the very acts, the very things, the proof shows were done in this case, are within the prohibition of the laws of the State. See.

Denson's case Supra and authorities cited.
State vs. Bank 108 Ala 3-6.
Farrior vs. New Eng. Mort. Co. 88 Ala 279.

If it was necessary to show that the contract was concluded in Alabama, then what was done in this case shows the contract was consummated and concluded in Alabama.

Equitable Life Ins. Co. vs. Clements 140 U. S. 226, 234.
New York Life Ins. Co. vs. Cravens 178 U. S. 389, 395.
Hart vs. Bray 50 Ala. 446.
Strong vs. Collins 35 Ala. 607, 611.
Hitchcock vs. U. S. Bank 7 Ala. 426-27-28-29.

The Alabama Supreme Court hold that section 4 article 14 of the constitution of that state is self executing, and did not require any legislative enactment to give it effect, that said provision is PROHIBITORY of any act of business in that state by a foreign corporation, unless BEFORE doing such act, the said provision has been complied with.

A transaction had, without the compliance with these laws is absolutely null and void, it transfers no title and creates no right or cause of action in the offending corporation.

Am. Un. Tel. Co. vs. Wes. Un. Tel. Co. 67 Ala. 26, 30 et seq.
Farrior vs. New England Co. 88 Ala. 275, 279.
New England Co. vs. Ingram 91 Ala. 337, 339,
Sullivan vs. Vernon 121 Ala. 393.
Dudley vs. Collier. 87 Ala. 431, 433, 435.
State vs. Bank 108 Ala. 3-6.
Smith vs. Ala. Life Ins. & Trust Co. 4 Ala. 558.
Smith vs. Kernochan 7 How. (U. S.) 198, 199.

The Supreme Court of Alabama hold that there need be no series of acts, but the doing of one such act, which is an exercise of any of the corporate functions for which the corporation was organized to engage in, is sufficient to condemn the transaction.

Farrior vs. New England Co. 88 Ala. 275, 278.
Dudley vs. Collier 87 Ala. 431.
Denson vs. Chatt. Nat. B. & L. Assn. 107 Fed. Rep. 777, 780, 781.

The record in this case shows there were a series of transactions had with other persons in the State of Alabama prior to 7th Oct., 1895, the time when petitioner complied with the laws.

See Record page 43.

The Supreme Court of Alabama hold these laws, prescribing the conditions under which foreign corporations may do business in Alabama, are police regulations.

Am. Un. Tel. Co. vs. Wes. Un. Tel. Co. 67 Ala. 26.
Dudley vs. Collier 87 Ala. 472.

Subsequent compliance with said Alabama laws cannot relate back and give validity to a contract or transaction which at the time it was made, was null and void.

Stephens vs. Smith 10 Wall. 321, 327.
Hall vs. Coxpell 7 Wall 542, 559.
Swan vs. Miller 82 Ala. 530, 540.
Pettit vs. Pettit 32 Ala 308.
15 Am. & Eng. Encyl. Law (2 Ed.) 936, 942.

Any conveyance or transfer of title made on a transaction forbidden by the constitution and statutes of the state is absolutely void and null, and divests no title, confers no right and creates no cause of action.

Stephens vs. Smith 10 Wall. 321.
Frederick vs. Gray 12 Kan. 518, 533.
Pettit vs. Pettit 32 Ala. 288, 289, 308.
Clark vs. Colbert 67 Ala. 92, 94, 95.
Smith vs. Kernochan 7 How. U. S. 198, 199.
Smith vs. Ala. Ins. Co. 4 Ala. 558.
Robertson vs. Hayes, 83 Ala., 290.
Swann vs. Miller, 82 Ala., 538, 540.
Thomas vs. West Jersey R. R., 101 U. S., 71, 87.
Tel. Co. vs. Yopst, 3 Law. Rep. Anntd, 224.
Jemison vs. Bmgham R. R. Co., 125 Ala.

The bill in this case is filed to enforce an unlawful and void contract and to recover under and through such illegal transaction. The alleged right and title to the relief asked rests upon a transaction null and void, because prohibited by the constitution and statutes of Alabama.

These laws were in force, and are now in force, in Alabama, when the petitioner entered into the transaction with Denson, and they informed petitioner that doing any business in Alabama, which involved the exercise of the functions or carrying into execution of any of the powers of the corporation for which it was created and organized to engage in and carry on, without first complying with the provisions of such laws was unlawful, and that the Supreme Court of Alabama condemned all transactions as null and void without obedience to these laws, and created no right or title and gave no cause of action, and that the same could not be enforced in the courts.

These provisions of the law were as much a part of the contract and as binding upon the petitioner, as if they had been written in the face of the contract.

Whatever their limitations were, upon the power of the petitioner to contract in Alabama, whatever their discriminations were, they became conditions of the right of the petitioner to do business in Alabama, and the consequences of the failure to conform to said laws were accepted by the petitioner.

Ignorance of the law is no excuse, as appears to be insisted on in this petition. The State prescribed the PURPOSES of a corporation and the MEANS OF EXECUTING THOSE PURPOSES. Purposes and means are within the State's control. This is true as to domestic corporations. IT HAS A BROADER APPLICATION TO FOREIGN CORPORATIONS.

What the Supreme Court of Alabama say the constitution and statutes of the State mean, the Federal Courts will accept, whether it is declared by limiting the object of their general language, or by separating their provisions into valid and invalid parts. The Federal Courts are bound by the interpretation given these laws by the Supreme Court of Alabama.

The interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence the

Federal Courts cannot oppose by views of their own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred, OR BE PERMITTED TO BE ENFORCED.

New York Life Ins. Co. vs. Cravens, 178 U. S., 389, 395, 397 to 401.

Water-Pierce Co. vs. Texas, 177 U. S., 28, 42 to 47.

Sullivan vs. Vernon, 121 Ala., 393, 396.

Because the note is made payable at Chattanooga and is dated there, and because the papers express that the transaction is entered into with reference to the laws of Tennessee, cannot defeat the operation of the constitution and statutes of Alabama bearing on this subject.

Authorities last above cited.

Equitable Life Ins. Co. vs. Clements, 140 U. S., 226 to 234.

If this case was tried in the Courts of Alabama, the transaction would be condemned as null and void and non-enforceable.

Farrior vs. New Eng. Co., 88 Ala., 275, 279. This case is on all fours with the case under consideration.

Sullivan vs. Vernon 121 Ala. 393.

State vs. Bank 108 Ala. 3-6.

The same rule of decision will prevail in the Federal Courts the question being one under the Constitution and statutes of a State and of State polity.

The petitioner is mistaken, that it is necessary to reverse the judgment in this case, to secure uniformity of decision in the Federal Courts. That purpose has no application in this case, it applies to cases of general jurisprudence, and where the Federal Constitution and statutes are involved. To reverse this judgment would be to create confusion, and to establish one rule in the Federal Courts and another in the State Courts as to the same question and that question too, being the interpretation of the Constitution and statutes of the State.

The positive rules controlling in such cases is that the State decisions furnish the paramount and binding rule of decision to the Federal Courts.

This case depends upon the meaning of the constitution and statutes of Alabama; the Supreme Court of that State, has given the construction and interpretation of those laws. The Federal Courts are precluded by such decisions and will adopt and follow them as the rule of decision in this case. The Federal Courts regard such decisions of the State Court, as a part of said laws and as binding upon them, and as conclusive, as the text of the constitution and statutes.

N. Y. Life Ins. Co. vs. Cravens, 178 U. S. 580, 586.
Louisiana vs. Pillbury 105 U. S. 294.
Leffingwell vs. Warren 2 Blach 599, 603,
Water-Pierce Co. vs. Texas, 177 U. S. 42, 47.
Erb vs. Morasch 177 U. S. 584.
Tullis vs. Lake Erie etc. 174 U. S. 348, 353.
M. K. & T. R. R. vs. McCann, 174 U. S. 580, 586.
Sioux City R. R. vs. N. A. Trust Co. 173 U. S. 99-107.
Morely vs. Lake Shore Co. 146 U. S. 162-166.
Aberdeen Bank vs. Chehalis Co. 166 U. S. 440.
Fallbrook vs. Bradley, 164 U. S. 112, 155.
Fairfield vs. Gallatin, 100 U. S. 52.

The petitioner by coming into the Federal Court, cannot secure greater or different relief than otherwise it would, if it had brought suit in the State Court.

If equity will not relieve a complainant in a State Court, neither will it relieve it in the Federal Court. The complainant can have only the same relief and no more, in the courts of the United States, that it can have in the State Courts.

Ewing vs. St. Louis, 5 Wall 413-419.
Iowa Railway Co. vs. Iowa, 160 U. S., 389, 393.
M. L. and Trust Co. vs. Krumsliz, 172 U. S. 351, 358, 359.

The authorities cited in petitioner's brief, are not in point in this case, and the points of contention in its brief, are outside the points involved in this case.

Probably it could be admitted that all the propositions of the brief are true, as abstract propositions, but they have no application to the case at bar. The Court of Appeals so held in its opinion in this case.

Denson's case, 107 Fed. Rep. 779.

The language of that court on said page eliminates from the decision of the case, under the laws of which state is the contract of loan to be construed, and in what place was the money loaned to be repaid· but the court bases its decision on the facts disclosed by the record, that the petitioner did business in Alabama in securing this loan, in contravention and violation of the laws of said state. On this point, the Court of Appeals uses this language: "On the facts as recited in the present case, it is perfectly clear that all the business of loaning the money to Denson, with the single exception that the Association in Tennessee said 'yes,' was transacted in the State of Alabama, and that the contract was completed by its execution and delivery of a note and deed of trust, and the payment of the money loaned, all in the State of Alabama; and the same was 'doing the business for which the Association was incorporated' within the meaning of the constitution and laws of the State of Alabama, as above quoted."

It is unnecessary to discuss or analyze the points and authorities presented by the brief of petitioner.

The authorities are inapplicable under the facts of the case, and the law of the case as announced by the Court of Appeals.

The Holder case 169 U. S. 81 cited by petitioner, is not an authority for its contention. The facts of that case, show the contract was made in Ohio. See pages 91 and 92 of that case. Under the facts in the case at bar, the contract was concluded in Alabama.

Equitable Life Ins. Co. vs. Clements 140 U. S. 226, 234.
New York Life Co. vs. Cravens 178 U. S. 389, 395.

The statute under consideration in the *Holder* case, expressly provides on its face, that "all *contracts* made in this state, Michigan, shall be void." Prohibition was on the making of

contracts and was not leveled against "engaging in or carrying on business" as in the Alabama laws.

This fact is overlooked by the petitioner, and was not involved in any of the cases cited by petitioner. A different state of facts, and different constitution and statutes are presented in the case, from that of any case cited on petitioner's brief.

The Allgeyer case 165 U. S. 578, has no application here. That case was on a different state of facts.

On page 583 of that case it is stated by the Court, that: "It is not claimed in this suit, that the Atlantic Mutual Insurance Company has violated this provision of the Constitution by doing business within the State." The facts are not only different but the principles of law are different, from the case at bar.

Unquestionably the *contract* in the Allgeyer case was made in New York, and all that was done in the State of Louisiana was the mailing of a letter of notification, which was done after the contract had been made in New York.

169 U. S. 586, 587, 588.

Attention is called to the fact that in the Allgeyer case, the case of Hooper vs. California, 155 U. S., 648, is distinguished from the Allgeyer case, and by the last case, no doubt was intended to be thrown upon, or in the least to shake the authority of the Hooper case.

In the Bedford case, 181 U. S., 227, the facts were different and a different statute was involved.

That case cannot be so distorted as to furnish any authority, or even persuasion, to reverse the judgment of the Court of Appeals.

It is not necessary to analyze the Bedford case—its purpose and principles are plain on the face of the case.

As stated in former part of this brief, the Supreme Court of Alabama construe and hold the Constitution and Statute under consideration as police regulations.

Am. Un. Tel. Co. vs. Wis. Un. Tel Co., 67 Ala., 26, 30.
Dudley vs. Collier, 87 Ala.. 432.

In this the Supreme Court was correct, as the State prescribes the purposes of a Corporation, and the means of executing those purposes. What is the meaning of the Constitution and Statutes of Alabama, what interest the State expresses in said laws, and what policy the State proposes to establish by them must be deemed to be authoritatively declared by its courts, and the Federal Courts will not oppose the same by views of their own.

New York Life Ins. Co. vs. Cravens 178 U. S. 389, 395 to 407.

These principles are recognized by the decision of the Court in the Bedford case *ante*.

In the Allgeyer case *ante* on page 579, 590 the Court say: "When or how far the police power of the State may be legitimately exercised with regard to such subjects must be left for determination in each case as it arises."

The opinion of Judge Hammond as reported in the Bedford case 88 Fed. Rep. 7, 10, 11, 13, 17 the distinction is there recognized between the Statute then under consideration, and that at bar.

In that opinion, page 17, the fact is recognized that the laws of Tennessee and those of Alabama as they relate to the matters under consideration, were enacted for an entirely different purpose, and to use a law like that of Alabama, to throw any light on the law of Tennessee, would be a perversion of the law of Alabama, and *vice versa*.

We don't understand that it is the office of a certiorari, under the statute that authorizes such writ in this case, that such writ will issue to review the finding and conclusion on the facts in this case, as made by the Court of Appeals.

If such was the law, then every case could be brought to the Supreme Court, determined by the Court of Appeals on its finding of facts, and for the purpose of getting a different finding and conclusion on the facts by the Supreme Court, from that made by the Court of Appeals. This would crowd the dockets of the Supreme Court with innumerable cases, and prevent that

relief to the dockets of the Supreme Court, that was the purpose to accomplish, by the creation of the Circuit Court of Appeals.

A CERTIORARI, at common law was a revisory remedy, intended only for the correction of errors of law apparent on the record, and was not a substitute for an appeal, nor allowed for the correction of errors of fact, which were properly revisable on appeal.

Dean vs. State 63 Ala. 153, 154.

It is not mandatory on the Supreme Court to grant this writ, but whether or not it shall issue, rests in the sound discretion of the court.

Unless the court can clearly see that an error of law has been committed, or that injustice will ensue unless the writ is issued, the same will be denied.

In view of the law, and the facts set forth in the record of the case as presented in Court of Appeals, the petition totally fails to present any grounds, or to offer any just reason why the writ should issue, and it is respectfully submitted that the same be not allowed.

Interest reipublicae ut sit finis litium.

O. W. Underwood.